United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original - Affidavit of Mailing

74-1412 B

To be argued by
PAUL B. BERGMAN

P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1412

UNITED STATES OF AMERICA,

Appellee,

—against—

NICHOLAS VOWTERAS and
NESTOR VOWTERAS,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Eastern District of New York.

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Of Counsel.

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Preliminary Statement

Nestor Vowteras and Nicholas Vowteras, brothers, appeal from judgments of the United States District Court for the Eastern District of New York (*Judd, J.*) entered on March 1, 1974, following a jury trial, convicting them of bribery in violation of Title 18, United States Code, Section 201(b) and conspiracy to bribe in violation of Title 18, United States Code, Section 371.* Each was sentenced to a

* Also named in the indictment, but acquitted, was Murray Baron, appellants' accountant. The indictment contained a conspiracy charge against all of the defendants alleging their agreement to bribe Kenneth Cooley, an Internal Revenue Agent (Count I). Counts II and III of the indictment, substantive bribery counts (18, U.S.C. § 201(b)), charged all of the defendants with having twice bribed Cooley, on December 21, 1972, with $500 and $4,500. Finally, Count IV charged the Vowterases alone with giving a bribe to Cooley in the amount of $10,000 on December 27, 1972. Appellant Nicholas Vowteras was convicted of Counts I and IV and acquitted as to Counts II and III. Appellant Nestor Vowteras was convicted of all the counts.

one year prison term with execution of the sentence suspended as to all but two months and each was placed on probation for the remainder of the sentence. Execution of sentence has been stayed by the District Court pending appeal.

On this appeal, in which appellants are represented by the same retained attorney, Jacob P. Lefkowitz, Esq.,* appellant Nestor Vowteras contends that "newly determined" evidence of his incompetency could, had it been presented at the trial, have resulted in his acquittal, and that, therefore, a new trial should have been ordered by the District Court. He further contends that the new evidence showed that he was incompetent to stand trial and that the District Court erred in not ordering a psychiatric examination pursuant to the provisions of Title 18, United States Code, Section 4244. Finally, appellant Nestor Vowteras contends that, because of his incompetency, his pretrial decision to proceed with the same counsel who represented his brother was not an "intelligent and competent abandonment of a knowing right or privilege." Appellant Nicholas Vowteras urges that a new trial should be accorded him because he had no knowlegde of his brother's "mental condition" and that "he would not have proceeded to trial represented by the same lawyer who was appearing on behalf of an incompetent.' No contentions are made with respect to the sufficiency of the evidence of guilt nor do appellants contend that any errors occurred during the trial.

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* At all times prior to and including the trial, appellants were both represented by Benjamin Lewis, Esq. At sentencing, although he had already retained Mr. Lefkowitz to proceed with his appeal, (See Affidavit of Robert Aron Fried, Appellant's Appendix, 5E) Nicholas Vowteras was represented by Mr. Lewis. Appellant Nestor Vowteras, however, was represented by Mr. Lefkowitz at his sentencing. (See Transcript of March 1, 1974 [10:00 A.M.], Government's Appendix, A. 119 and Transcript of March 1, 1974 [2:00 P.M.], Government's Appendix, A. 125).

Statement of the Case

A. The Government's Case

In July of 1972, Revenue Agent Kenneth Cooley was assigned the 1971 fiscal year tax return of the Argo Compressor Service Corp. ("Argo") for purposes of conducting a routine corporate tax audit. Argo's business is the sale and servicing of commercial air compressors in the tri-state metropolitan area (69).* Appellants Nicholas Vowteras and Nestor Vowteras were, respectively, the President and Secretary-Treasurer of Argo. Each owned 46.5 percent of the corporate stock. The tax return had been prepared by Argo's accountant, Murray Baron (48, 51-52, 60). Among other items, it showed a "Commission Expenses" deduction of $63,396.69 and a deduction of $58,351.54 for "promotional & Selling Expense" (77). Following notification to Argo by Cooley an appointment was made for October 11, 1972 at which time Cooley was to begin his audit of the Argo books and records (53).

Cooley arrived at Argo on the scheduled day at about 9:30 A.M. (61). He met Baron as well as Nicholas and Nestor Vowteras (63). Soon thereafter, he was given Nicholas' desk for work space and, with Baron working close by, he began the audit (64, 78). The morning was uneventful and was devoted to routine auditing procedures (80-83).

For lunch, Cooley went to a local restaurant with Baron. As they were approaching the restaurant, Baron, referring to appellants, said to Cooley: "These guys are probably going to make you some kind of a part time offer" (85). He told Cooley that that was the way "they work" and that Cooley should not be alarmed (86). Cooley did not respond

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* Page references in parenthesis refer to minutes of the trial.

and the two men had a general luncheon conversation (86-88). After lunch, the following conversation took place:

> [Cooley]: . . .We left the restaurant and we were walking back to Mr. Baron's car and Mr. Baron said:
>
> "So would you be interested in some kind of part time offer?"
>
> I replied, "No."
>
> Mr. Baron stated, "Okay."
>
> As we got into the car I said to Mr. Baron, "What do you mean by part time offer?"
>
> Mr. Baron explained that I might not understand the business, he stated that the air compressor trade is a very competitive industry and Argo Compressor Service Corporation did not get from a corporation doing very small sales to a corporation doing a million and a half dollars in sales in a very competitive industry unless they were to pay off and do a lot of entertaining, and this is the way they attained their present sales status.
>
> I again asked Mr. Baron what he meant by part time offer.
>
> He said to me that, "There are some items that you just can't keep records on, these guys report all their sales and there is no omission of income but there are some items like commissions and entertainment expenses that you just can't keep records on."
>
> He said that he imagined that I had been doing audits long enough to know this.
>
> I then stated to Mr. Baron, I asked him why they would make me an offer, and Mr. Baron told me that I should face it, I was young, I had a mortgage to pay and that he didn't have to tell me anything further.
>
> I asked Mr. Baron again I think what he meant by part time offer, he said these guys would be glad

to show their appreciation for any consideration I could offer them in the area of travel and entertainment and commission expense.

* * * * *

Q. Did you thereafter question Mr. Baron about what he meant by the word "appreciation?" A. Yes, I asked how they would show their appreciation, and Mr. Baron indicated to me that I should wait until I see the figures (88-90).

During the afternoon of the 11th, Cooley continued the audit. At about four o'clock, however, Cooley was invited by Nicholas to have a cup of coffee. Cooley accepted and was thereafter given a tour of the plant by Nicholas and Baron. During that tour, Nicholas offered to give Cooley a portable air compressor. When Cooley refused, Baron advised Nicholas to take Cooley's address and send it to him. Once more, Cooley refused (92-95).

Cooley departed the Argo premises at around five o'clock with the understanding that he would return on November 28th to continue the audit (95). When he returned home that evening, he telephoned John Stolzenthaler,* the Assistant Regional Inspector for the I.R.S. Cooley reported the days' events and was instructed to report the following day to the Regional Inspector's office at 26 Federal Plaza. The next day, Cooley reported as instructed and prepared an affidavit which detailed the pertinent conversations and events of the previous day (101-103).** Thereafter, every telephone and face to face conversation that Cooley had with appellants and Baron was tape recorded (107; see also Stipulation, Government Exhibit 15A; Government's Appendix, A. 108).

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* Incorrectly spelled "Sozenthaler" in the transcript.

** Cooley's handwritten notes of October 11 and his affidavit were eventually introduced in evidence (925; see Government Exhibits 18 and 19, Government's Appendix, A. 111, A. 113).

Following a change in the appointment date from November 28th to November 29th (103), Cooley met a second time with Baron and the Vowterases at Argo (116). Nestor Vowteras was present during the early morning, but thereafter left (118). Nicholas Vowteras remained for the entire day. Cooley continued his audit. Shortly before lunch, Cooley turned his attention to the so-called "Commission Expenses" deduction of $63,396.69 (117-118).

In his examination of the books supporting the commission expense account, Cooley determined that about $59,000 worth of the deduction was represented by checks which had been drawn to cash and endorsed by Nestor or Nicholas (121-122, 158-162). It was explained to Cooley that the sum represented cash payments to purchasing agents who would not accept checks. The payments were, in a word, "kickbacks" (124-126, 204) and, because of that, Cooley's request for a listing of purchasing agents was refused (131-132).

Following lunch, Cooley explained to Nicholas and Baron that if the payments were not verified they would lose their status as deductions and become dividends taxable to both Argo and the Vowterases (See Transcribed Conversation Number 1; Government's Appendix, A. 70; 150-151). Once Cooley had explained the ramifications to Nicholas, Nicholas' language became sprinkled with expressions such as, "whatever you can do for me, I'd really appreciate" So, . . . I don't know what to say . . . I'd like to work with you if there's anyway;" ". . . . what can I say, see I'd love to . . . I don't know what to say . . ."(id). Cooley did not directly respond to those statements, however, and turned to other areas of the tax return (146-147).

Later in the afternoon, the commission expense deduction was raised again in conversation (147-148). This time, Baron joined Nicholas in a chorus of entreaties and over-

tures. Thus Baron: "You know, if there's some way that you can, you know, open your mind up a little bit, we would show our appreciation;" Nicholas: "I'd love, anything I can work, if I can work, anything, I don't give a shit what it is but . . . ;" ". . . Jesus, I don't know, eh, what to say eh, I'd love to work anything out with you that I could, I don't care what it is;" "Jesus Christ, anything I can do, eh, Murray, whatever you can work out I mean, I'd appreciate it." Baron: "Well, what he means is . . . he'll find a way to show his appreciation, if you, you know, see your way clear to . . .;" Nicholas: "Right, to help me out;" Nicholas: ". . . If we can work something out, it's nobody's eh, business" (See Transcribed Conversation Number 1a; Government's Appendix, A. 73-A. 82).

Throughout, Cooley neither rejected nor accepted the overtures of Baron and Nicholas but acted in accordance with the instructions he had received at training school and immediately after the October 11th meeting (43-44, 114-115). Baron and Nicholas, however, were persistent (see Transcribed Conversations Numbers 1b, 1c and 1d; Government's Appendix, A. 83-A. 85).* Nevertheless, the matter remained unresolved at the November 29th meeting.

Cooley's next audit was held on December 21. Present that day were Baron and Nestor. Nicholas, though present for about an hour in the morning, left Argo and was not present during any of the events and conversations of that day (164). At that meeting, Cooley examined the "Promotional & Selling Expense" deduction ($58,351.54) and found, as he had with the commission expense deduction, the same lack of supporting documentation (165-166; 169-170). Suffice it to say that Baron's prophecy of Nestor Vowteras' generosity proved, that day, to be correct.** Thus, follow-

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* Cooley's testimonial narrative of the transcribed conversations for November 29 can be found at pages 146 through 162 of the trial transcript.

** By that time, Nicholas' generosity had been demonstrated not only in his persistent offering on October 11th of the air

[Footnote continued on following page]

ing the lunch hour break, Cooley was given by Baron a liquor carton containing five one hundred dollar bills (214, 241-242). Thereafter, in quick succession, Nestor promised an additional $14,500 and, to show Cooley his good faith, handed him $4,500 in cash (249, see also Transcribed Conversations 2-2d, Government's Appendix, A. 86-A. 100). Future arrangements were anticipated for the delivery of the remaining $10,000 (Transcribed Conversations 2c and 2d, Government's Appendix, A. 94-A. 100).*

Cooley went to Argo for the last time on December 27. It was a congenial meeting (260-267). He was greeted by Nicholas and Nestor (260). Nestor, true to his word, gave Cooley the remaining $10,000.** Though not present when the money was actually delivered (261-266, 1138; See Transcribed Conversation Numbers 3 and 3a, Government's Appendix, A. 101-A. 103), Nicholas came into the room shortly thereafter. The following conversation then occurred:

> Nestor: Very good Ken, . . . (inaudible) . . . and, uh, listen, anything you want theaters, anything. You just have to call Nick or I. Remember you asked me last week . . . (inaudible) . . . those kind of questions who knew about this? Only he and I.

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compressor but also on November 29th when he offered Cooley (an offer refused) a complete turkey dinner for Thanksgiving (1114-1116, Government Exhibit 1, Transcribed Conversation 1a, Government's Appendix, A. 73-A. 82).

*Cooley's narrative of the transcribed conversations for December 21 can be found at pages 170-176, 213-255.

**Bank records showed that on December 27, 1972, Nicholas Vowteras withdrew $10,000 from a personal savings account at the Atlantic Bank of New York (see Government Exhibit 24C, Government's Appendix, A. 118). On the same day, Nestor Vowteras drew two checks, each for $5,000 on Argo's account at the same bank (see Government Exhibits 24A and 24B, Government's Appendix, A. 116-A. 117, and 275 of the trial transcript).

Nicholas: Right.

Nestor: Only he and I.

Nicholas: Right. We appreciate, listen it . . .

Nestor: We're together 33 years and we don't hide nothing from each other.

Nicholas: Right.

Nestor: That's as far as it goes.

Nicholas: That's it.

Cooley: How about the other officers?

Nestor: No.

Nicholas: No. No, they don't have to know anything. It's none of their business. We are the senior officers here.

* * * * *

Nicholas: So, listen, we're trying to . . .

Nestor: So, we thank you very, very much.

Nicholas: . . . make you know. Listen I really appreciate it, Ken. Thank you very much.

Nestor: And have a happy and healthy New Year.

Nicholas: Yeah, right.

Cooley: And eh, take care of yourselves.

Nicholas: Right anytime you need something.

Nestor: Thank you very, very much Ken and anytime. I told Nick, if I'm not here . . . (inaudible) . . .

Nicholas: Oh yeah.

Nestor: Theaters.

Nicholas: Anytime. Anything.

Nestor: Football, baseball, hockey.

Nicholas: Anything.

Cooley: O.K.

Nestor: We have season tickets here for our customers.

Nicholas: Heh, heh, heh.

Nestor: . . . (inaudible) . . .

Cooley: Am I a customer?

Nestor: Yep. (Government Exhibit 1, Transcribed Conversation 3b, Government's Appendix, A. 104-A. 107).

On January 4, 1973, Cooley returned a telephone call from Nestor. Nestor had called Cooley to wish him a happy New Year (268, 271).

B. The Vowteras' Defense

The joint defense of the appellants included calling two Government employees in an effort to show that Cooley was a programmed agent trained to entrap innocent taxpayers.* In addition to calling a Certified Public Account (Irving Gross, 1039-1054), the defense called appellant Nicholas Vowteras as a witness.

Nicholas testified that Cooley, when he first met with him on October 11th, began talking about the high expenses for a new house he had purchased (1065). That afternoon,

* See testimony of Revenue Agent Howard Ashner (939-999), who formerly had audited Argo's books and testimony of Harvey Gottleib, Cooley's group supervisor (1001-1038).

he offered to *sell* an air compressor to Cooley, not give it to him (1072). As far as the various taped conversations of November 29th were concerned, Nicholas denied that he ever intended to offer or suggest the payment of a bribe to Cooley (see, e.g., 1079-1080, 1086, 1089-1070, 1092, 1094-1098, 1100-1101, 1111-1113, 1118-1121). Rather, he considered some of Cooley's remarks as invitations and solicitations or even threats (see e.g., 1085-1087, 1095-1096, 1100-1101, 1113-1114). He explained that the "kickbacks" to purchasing agents were not kickbacks but small amounts of money paid as tokens of Argo's "appreciation" (1081-1082). In explanation of the $10,000 withdrawal from his personal back account on December 27, 1973, Nicholas stated that he had used the money for incidental home expenses and a $5,000 diamond ring for his wife (1105-1107). He did not give the money to his brother nor to Cooley (1108).* As far as the turkey dinner, Nicholas explained: "It was just my generosity at that point, I imagine" (1115).

Following the November 29th audit meeting, Nicholas spoke with his brother, Nestor. He advised Nestor that Cooley was ". . . trying to shake us down," and Nestor replied: "That son-of-a-bitch" (1125-1126).

Thereafter, Nicholas and Nestor met with two tax consultants, the Stolers, and after having described to the Stolers the events of November 29, were advised: "Don't be crazy and try to bribe them" (1130).**

On December 27, Nicholas was told by his brother that Cooley had been paid "some money;" . . . "$5,000" (1131-1132), and that he was "very, very upset over this" (1132). He later learned that Cooley was going to return for the

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* The $10,000 withdrawn by Nestor was, similarly, not used to pay Cooley (1137).

** When he was arrested, Nicholas told the arresting agents: "We got some bad advice" (1212, Government Exhibit 3500-1, Government's Appendix, A. 66).

remaining $10,000 (1132-1133). Nicholas did not notify the authorities because of his "close relationship" with his brother (1140). Appellant Nestor Vowteras did not testify.

Following a day and a half of deliberations, the jury returned its verdict.

C. The joint representation of Nicholas and Nestor

1. Proceedings of November 26, 1973

On November 26, 1973, the day before the commencement of the trial, the parties appeared before the District Court (See Transcript of November 26, 1973, Government's Appendix, A. 1). In addition to stipulating to the accuracy of the Government's transcripts (Government Exhibit 1), the chain of custody of the tapes themselves and the absence of a need for audibility hearings (*id.*, at pp. 3-5, Government's Appendix, A. 3-A. 5), the Government raised with the Court and counsel its concern with the possible impact of the recently decided case of *United States* v. *DeBerry*, 487 F.2d 448 (2d Cir. 1973)* on the circumstance that Nestor and Nicholas were both represented by the same counsel, Benjamin Lewis (*id.*, at pp. 6-7, Government's Appendix, A. 6-A. 7). Counsel for Nicholas and Nestor stated that he was aware of the *Edwards* decision and that, on his reading of the case, ". . . it is possible for defendants to waive any conflict of interest claimed" (*id.*, at p. 7, Government's Appendix, A. 7). When the Court indicated its belief that a hearing might be necessary, the Assistant United States Attorney offered to provide the Court with the transcripts and the discovery material previously provided to defense counsel in order to aid the Court in ascertaining potential areas of conflict. In addition, the Assistant, in the presence of Nestor and Nicholas, briefly summarized the Government's evidence and offered his own judgment as to a possible area of conflict; to wit:

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* Transcribed, inaccurately, as "deBrisey and Edwards."

that whereas Nestor could possibly offer a defense of entrapment, Nicholas could simply defend on a theory of non-participation (*id.*, at pp. 7-11, Government's Appendix, A. 7-A. 11).

In response, counsel for the Vowterases stated that there was a "possibility" that "there could be separate, distinct defenses" (*id.*, at p. 11, Government's Appendix, A. 11). The following colloquy then ensued:

> The Court: Well, let me just ask you this:
>
> Mr. Nicholas Vowteras——
>
> The defendant Nicholas Vowteras: Yes, your Honor?
>
> The Court: You heard what Mr. Bergman said and it is possible that you were at only one or two of the conversations, and you might ask yourself whether you would want to put in a different defense from your brother?
>
> The defendant Nicholas Vowteras: That is right.
>
> The Court: Is it your brother?
>
> Mr. Nicholas Vowteras: Yes, your Honor.
>
> The Court: I don't want to be in a position where I have to try the case twice because you change your mind later about a joint representation.
>
> It is more important to me to have just one trial than it is for you to have saved a little money on attorney fees.
>
> Are you satisfied about this matter?
>
> Mr. Nicholas Vowteras: Yes, I am, your Honor.
>
> The Court: And Mr. Nestor Vowteras, you also might be able to have a different defense from your brother's, and the attorney has to represent you both

as well as he can, but if you want to have separate representation, now is the time to tell me.

Mr. Nestor Vowteras: No, I'm satisfied with it.

The Court: Will you be satisfied if it turns out later on that you are convicted and if then some second lawyer says there might have been a different way to treat one of you than the other?

Mr. Nestor Vowteras: I have to leave that to Mr. Lewis.

The Court : What did you say?

Mr. Nestor Vowteras: I have to leave that to Mr. Lewis.

Mr. Lewis: Your Honor, I've represented this on several occasions to them, much more after the coming down of the DeBrisey [DeBerry] case, I made it clear to them that at a certain part of the case, a client must make a decision as well as an attorney.

The Court: Yes.

Mr. Lewis: We try to make most decisions which we can for our clients.

The Court: You can think about it until tomorrow morning, although I don't like to give last-minute adjournments for lack of counsel.

Mr. Nicholas Vowteras: My mind is made up.

Mr. Nestor Vowteras: I will go along with that, too.

The Court: All right, all right, all right (*id.*, at pp. 12-14, Government's Appendix, A. 12-A. 14).

Following the colloquy, it was understood that the Vowterases would rethink their position overnight and advise the Court the next day.

2. Proceedings of November 27, 1973

On the following day, Judge Judd asked counsel for the Vowterases to advise the Court as to the possibility of conflict. Defense counsel responded as follows:

> Mr. Lewis: Your Honor, it is obvious for reasons well known to his Honor that to discuss our complete defense at this time is not a wise move of defense counsel. However, I must state that there is a real possibility that only one of the defendants may take the stand and one may not take the stand.
>
> It is difficult to characterize it as one putting the blame on the other. I believe it would be a unified defense. However, it could possibly have another interpretation and I would really rather not venture an opinion in that respect. But I do suggest to the court that that is a possibility (Transcript I of November 27, 1973 [12:00 o'clock noon] at p. 4, Government's Appendix, A. 23).

Thereafter, the Assistant, in an effort to provide the Vowterases and counsel with a basis for making, as he characterized, a "meaningful judgment as to whether or not this representation is to continue . . ." (*id.*, at p. 8, Government's Appendix, A. 27), offered to provide counsel with "all the 3500 material in this case . . . and . . . respond to any questions that they may have of me now with respect to the evidence that the Government is going to produce" (*id.*).

Thereafter, the following colloquy ensued:

> The Court: Now are you suggesting, Mr. Lewis, that you think there should be separate counsel, and, if so, have you made preparations for it?
>
> Mr. Lewis: I have not made that suggestion, your Honor. I would certainly—I feel perhaps it should be up to my clients, perhaps with the guidance of the court. But I allude back to Mr. Bergman's

suggestion that he would make available the 3500 material and the sequence of his evidence, and perhaps that might aid us in coming to a decision in this respect.

The Court: All right. Well suppose we take a half-hour to do that. It may delay the picking of the jury. But we must proceed.

With respect to the two brothers I think the question that they should consider is whether either of them hopes that he will get off with his brother found guilty, or whether they both really recognize that it was a joint venture, and that's really their choice. There are two problems, a right to choose your own lawyer and also a right to have a lawyer who will not be tempted to even sacrifice your interests for your brother's.

Mark the 3500 material.[*]

* * * * *

I would like to have the Vowteras defendants and Mr. Lewis review the 3500 material and report to me whether there is any problem of joint representation.

It is a serious matter. The Court of Appeals seems to say that I should question the client.

Mr. Lewis: I am not contradicting your Honor as to questioning my client. I want to take up the suggestion of your Honor to review the material furnished by Mr. Bergman and come to a further decision.

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* The "3500" material which was provided included Cooley's entire audit file, summaries of the transcripts prepared by Cooley, Cooley's affidavit of October 12, and two additional writings prepared by Cooley during the course of the audit (*id.*, at pp. 19-23, 30, Government's Appendix, A. 38-A. 42, A. 49). The foregoing material was in addition to the discovery material previously provided.

The Court: All right. How long do you need for that?

Mr. Lewis: I would suggest a half an hour.

The Court: That clock is fast. Let us assume twenty minutes of one real time.

Mr. Bergman: Thank you, your Honor.

The Court: That will give you a little more time (*id.*, at pp. 9-10, 28-29, Government's Appendix A. 28-A. 29, A. 47-A. 48).

After the recess, the Vowterases, with their counsel, acknowledged that they had reviewed the 3500 material and, according to counsel, . . . "some of our other problems . . ." (Transcript II of November 27, 1973) [12:00 noon] at p. 3, Government's Appendix, A. 52).*

The following colloquy then ensued:

The Court: Let me speak with them a few minutes if they will come forward, please.

Now, which is——

Defendant Nicholas Vowteras: I am Nicholas.

The Court: Mr. Nicholas, do you concur with Mr. Lewis that you have reviewed the material that is likely to be produced and you want him to represent both you and your brother?

Defendant Nicholas Vowteras : Yes, I do, your Honor.

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* The record on appeal consists of three transcripts for November 27, 1973: Two of them are designated as having transcribed colloquy at noon that day. Both of those have been reproduced, in sequence at A. 20-A. 50 of the Government's Appendix. The third transcript of November 27, 1973, the transcript of the subsequent *in camera* proceedings and the proceedings in open court thereafter, appears in Appellants' Appendix.

The Court: Do you believe that you and your brother each knew about all the activities?

Defendant Nicholas Vowteras: Yes, I do.

The Court: And you do not disapprove or disassociate yourself from anything he was doing?

Defendant Nicholas Vowteras: Yes, your Honor.

Mr. Lewis: Approval and disapproval at times—if an act is done and it is two brothers, approval could be by not doing anything about it and disapproval could be a mental state of mind as well. It's hard to say it was approved—in that sense the answer should be qualified.

The Court: Is there anything that your brother did that you say should not be considered as evidence against you and you would want a jury to treat as being done on his own and without your accepting responsibility for it?

Defendant Nicholas Vowteras: I don't know how to answer that. I am not that up on the law. I know we are both in this together. We want to stick together.

Defendant Nestor Vowteras: We have been in business 33 years together and got along all our lives together. That is our decision, to go all the way with the good Lord.

The Court: You are Mr. Nestor Vowteras?

Defendant Nestor Vowteras: Yes.

The Court: It is your position that if there is a verdict you consent to have it go against you both as guilty or both not guilty and not making any separate defense?

Defendant Nestor Vowteras: That is what our position is, to go along with it.

The Court: It is a serious matter involved. I don't know what my sentence would be if there is a finding of guilty, but the conspiracy count under 371 could carry a five-year imprisonment and $10,000 fine, and the bribery counts could each carry imprisonments of up to 15 years or $20,000 in fines. They are serious matters.

Defendant Nestor Vowteras: We realize that, your Honor.

Defendant Nicholas Vowteras: Yes, your Honor.

The Court: Is there anything that either of you has kept back from your brother or your attorney because you think——

Defendant Nestor Vowteras: We told our attorney everything.

The Court: Because you don't want anybody——

Defendant Nestor Vowteras: I haven't kept anything back.

The Court : Mr. Nicholas?

Defendant Nicholas Vowteras: No, your Honor (Transcript II of November 27, 1973, at 3-5, Government's Appendix, A. 52-A. 54).

Thereafter, it was suggested to the Court that an *in camera* proceeding be held by the Court with the Vowterases and their counsel present and with everyone else excluded. The suggestion was accepted and Judge Judd was provided with the essential portions of the Government's prosecution file (*id.*, at pp. 5-9, Government's Appendix, A. 54-A. 58).

The *in camera* proceeding which was subsequently held involved the Court, the Vowterases, and defense counsel for the Vowterases. That proceeding, which began before the luncheon recess and thereafter continued has been re-

produced in its entirety in Appellants' Appendix. The Court is respectfully referred to it in its entirety. In a word, after a searching inquiry by Judge Judd, it continues the jointly expressed desire of the Vowterases to be represented by single counsel.

D. Post Trial Motions

The jury's verdict was returned on December 7, 1973. Thereafter, by motion dated December 12, 1973, appellants —still represented by Mr. Lewis—moved for a judgment of acquittal or, in the alternative, for a new trial pursuant to Rule 33, F.R.C.P. That motion, which involved matters not pertinent to the issues on this appeal, was denied by Judge Judd on December 21, 1973 (See Defendants' Motion of December 12, 1973 and affidavit of Benjamin Lewis attached thereto; Government's Affidavit in Opposition; and Transcript of December 21, 1973).

Thereafter, by motion dated February 21, 1974, appellant Nestor Vowteras (by that time represented by Mr. Lefkowitz) moved again for a new trial pursuant to Rule 33, F.R.C.P. and, additionally, for the conduct of a hearing pursuant to Title 18, United States Code, Section 4244 and *Westbrook* v. *Arizona,* 384 U.S. 150 (1966).* Attached to the motion were the affirmations of three attorneys (Mr. Lefkowitz, Robert Aron Fried, an associate of Mr. Lefkowitz, and Mr. Lewis) and the affidavits of two doctors; Hyman G. Weitzen, a neuropsychiatrist and Louis D. Ferris, an internist.**

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* No separate motion was made for appellant Nicholas Vowteras nor did the motion for Nestor Vowteras contain any prayer for relief for Nicholas.

** The entire motion and the affidavits have been reproduced in Appellants' Appendix at 1E-22E. The Government notes that, in reproducing the second page of attorney Lewis' affidavit (13E), the last line has been lost. Thus, following the word "gambling," the sentence continues: "problem and depression that he had seeing Nestor intermittently. . . ."

1. Affirmation of Robert Aron Fried

After quoting from segments of the November 27 *in camera* proceeding at which the appellants told Judge Judd of their decision to continue Mr. Lewis as their sole counsel, Mr. Fried affirmed:

> Since the completion of said trial and on or about January 10, 1974, after being retained by Nicholas Vowteras to handle the appeal in the above case, Jacob P. Lefkowitz, Esq., discovered for the first time certain facts hereinfater set forth, which Benjamin Lewis, Esq., trial counsel for Nestor Vowteras did not and could not discover before trial in the exercise of due diligence for the reasons that are set forth in the attached affirmation of Benjamin Lewis, Esq.

Mr. Fried continued that the new evidence, Nestor's mental disability, was "not cumulative or impeaching in nature" and that it was "of such a nature and so material" as to require determinations that Nestor was: (1) not competent to stand trial; or (2) that he had not waived the right to effective assistance of counsel; or (3) that had the jury known of Nestor's condition it would have acquitted not only Nestor, but Nicholas as well. Mr. Fried requested, also, that either a hearing be held on the issue of Nestor's mental condition or that he be examined.

2. Affirmation of Jacob P. Lefkowitz

Mr. Lefkowitz' affirmation details a conversation he had with Nestor after he was "retained by Nicholas Vowteras to handle the appeal. . . ." From that conversation, Mr. Lefkowitz concluded that Nestor, though a "competent businessman," nevertheless evinced reactions and gave answers which were "pungent and irrational." Thereafter, according to Mr. Lefkowitz, he spoke with Dr. Ferris, and finally, Dr. Weitzen. Mr. Lefkowitz' conclusion from those con-

versations and "newly discovered evidence" was that there existed ". . . a substantial question of whether Nestor Vowteras, under the circumstances, was competent either to stand trial and/or waive his right to separate counsel as is required by due process."

3. Affirmation of Benjamin Lewis

Mr. Lewis affirmed that, as counsel to Nestor, he was "ignorant," "prior to and at the time of the trial . . . of the facts, discovered subsequent to trial by Jacob P. Lefkowitz, Esq., concerning Nestor's mental condition."

Mr. Lewis went on to affirm, however, that as early as June 15, 1973—three days after the indictment was filed and less than a week before Nestor's plea of not guilty—he and his law partner, David L. Kitzes,* met with Dr. Weitzen and "spoke with him about Nestor Vowteras."** Dr. Weitzen, according to Mr. Lewis, was "extremely passive and non-communicative." Mr. Lewis also affirmed that when he first met Nestor, "in the limited, familiar world of his business . . ." he did not believe "him to be irrational or incompetent. . . ." On those facts, Mr. Lewis stated that he had ". . . no further reason to investigate this area in greater detail."

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* Mr. Kitzes was present throughout the trial as well as at the proceedings on November 26 and 27. In addition, he meticulously questioned the witnesses Aschner and Gottlieb.

** During the course of the subsequent oral argument in the District Court, Paul B. Bergman, the Assistant United States Attorney who had been in charge of the prosecution throughout, remarked that, shortly after the indictment was returned, he spoke with Mr. Lewis and advised him ". . . that there was a conflict, at least as I saw in the case; that he ought to explore it" (Transcript of March 1, 1974 [2:00 P.M.], at p. 14, Government's Appendix, A. 138).

Nevertheless, Mr. Lewis continued, because of those ". . . facts, discovered subsequent to trial by Jacob P. Lefkowitz, Esq., . . ." coupled with his own recollection of Nestor's conduct and apparent frame of mind on the day of the *in camera* proceeding ("very upset," "unhappy," "withdrawn," "uncommunicative") and his conclusion, somewhat in the manner of Rubashov, was, as follows:

> Had I been aware of the facts concerning Nestor's mental condition my advice to him may have differed considerably concerning both the question of separate counsel and defense strategy.

4. Affidavit of Hyman G. Weitzen, M.D.

Dr. Weitzen, a neuropsychiatrist, has been treating Nestor since 1955, during Nestor's "circumscribed periods" of gambling and "lavish spending of money." Those periods, characterized by Dr. Weitzen as "attacks," occurred when Nestor was "basically depressed." At those times, according to Dr. Weitzen, Nestor's judgment "was quite poor." Nestor would see Weitzen at those times and "after a visit or two his mood would improve as did his judgment." At other times, when Nestor's "mood of depression" was extended, repeated visits were required. Concerning Nestor's relationship with his brother, Nicholas, Dr. Weitzen opined that Nestor has always ". . . had a neurotic fear of offending his brother and often made unreasonable concessions to him." In that regard, Dr. Weitzen also stated that he had read the *in camera* transcript of November 27, 1973, and that it was his "impression" that Nestor perceived [the choice of separate counsel] ". . . as a threat to his relationship to his brother rather than the obvious conclusion that he might or might not be convicted and possibly go to pail." Dr. Weitzen also stated, concerning the *in camera* proceeding, that Nestor's ". . . mental state may well have been so confused that he was unable to understand the significance of choosing his separate counsel."

Dr. Weitzen concluded his affidavit as follows:

> It is my considered opinion, knowing him as I do over an extended period of time, that Nestor Vowteras would be torn by the sense of loyalty to his brother and the depressive nature of his personality in times of stress so that he would not likely make a competent decision as to whether or not he should obtain separate counsel to represent him at the trial. In fact, I would doubt that he was capable at that time of making any rational judgment concerning any unfamiliar matter of any importance.

5. Affidavit of Dr. Louis D. Ferris

Dr. Ferris, an internist who has treated Nestor since 1970, stated that when he saw Nestor on November 3 and 7, 1973, (three weeks before the trial began) he found it "necessary to prescribe Lithium as specific for manic depressive reactions." Having also read the *in camera* transcript of November 27th, Dr. Ferris concluded:

> It is my considered opinion that Nestor Vowteras was at that time incapable of making any rational judgment and was incapable of making a competent decision as to whether or not he should obtain separate counsel to represent him at the trial.[*]

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* It should be noted that Dr. Ferris' "considered opinion" was additionally based on the circumstance that, prior to his return to the *in camera* proceeding after lunch, Nestor had eaten a "sweet *crumb bun*," a substance which, for no organic reason, Dr. Ferris has found induces in Nestor "Vowteres" [sic] "extreme fatigue" and "depression" (emphasis in original).

E. Proceedings of March 1, 1974

At 10:00 o'clock in the morning of March 1, 1974, appellant Nicholas Vowteras, represented by Mr. Lewis, with Mr. Lefkowitz present, was sentenced (see Transcript of March 1, 1974 [10:00 A.M.], Government's Appendix, A. 119). That afternoon, appellant Nestor Vowteras, represented by Mr. Lefkowitz, was sentenced (see Transcript of March 1, 1974 [2:00 P.M.], Government's Appendix, A. 125). Before sentencing, however, oral argument was had on Nestor's motion for a new trial and a psychiatric hearing or examination.

In denying Nestor's motion, Judge Judd remarked, *inter alia*:

> The Court: I don't read the DeBare [DeBerry] case as saying the courts must force co-defendants to hire separate counsel if they choose not to. The quotation that you have says that the court should see that the defendant is fully advised as to the facts underlying the potential conflict and is given an opportunity to express his or her views.
>
> That was done here. Mr. Nestor Vowteras was before me in the morning and in the afternoon. I observed nothing to question his mental alertness at the time.
>
> You have a very selective claim now. You're not claiming that he was incompetent to advise counsel concerning his defense of the trial. You're saying he was incompetent only to make a waiver. I don't recognize that kind of selective incompetency. I deny your motion (*id.*, at 19-20, Government's Appendix, A.).

At the subsequent sentencing, counsel stressed, during the allocution, Nestor's psychiatric background. The Court then interjected and stated it would commit Nestor for study and

observation pursuant to the provisions of Title 18, United States Code, Section 4208(b) and "get an official report." That alternative, however, was not acceptable to counsel ("I certainly don't look for such commitments") and the Court thereafter abandoned that type of sentence (*id.*, at 20-22, 24-25, 29, Government's Appendix, A. 144-A. 146, A. 148-A. 149, A. 153). The Court remarked:

> Here's a man carrying on a business, living with his family, being a part of the business community, and it is not being suggested that he's so incompetent that he shouldn't have been tried or had insanity defense (*id.*, at 29, Government's Appendix, A. 153).

ARGUMENT

Appellants' intertwined claims of Nestor Vowteras' newly discovered mental incompetency and the divided loyalty of counsel are without merit.

Appellant Nestor Vowteras contends that he should have a second trial because two months after he was found guilty at the first trial his new attorney discovered that he was mentally incompetent when he chose his first attorney. With utter aplomb, appellant Nestor Vowteras argues, *reductio ad absurdum,* that had his first attorney known of his incompetency before the first trial he might have: (1) conducted his defense differently; (2) not conducted the defense at all by showing the Court that his client was not competent to go to trial; or (3) or, one assumes, advised his client to get a new attorney, or at the very least recognize that Nestor wasn't competent to choose him as his attorney. Fortuitiously for appellant Nestor Vowteras, there was also present in the case a question of dual representation because his attorney also represented his brother, Nicholas. So, corralling the doctrine of "waiver," he argues that he was not competent to waive his right to separate counsel. Finally, Nestor Vowteras

argues that Judge Judd erred in not granting him, at the least, the opportunity to substantiate, pursuant to the provision of Title 18, United States Code, Section 4244, his post trial claim of mental incompetency. Appellant Nicholas Vowteras claims that he was prejudiced because his attorney also represented a mental incompetent; his brother. The Government contends that, on the record of this case, each of appellants' contentions is frivolous.

The only thing "newly determined" about Nestor's "mental disability" was the ingenuity of his second attorney in recognizing additional gloss to the main defense of entrapment. There is no question on the record but that Benjamin Lewis, Nestor's counsel from the inception of the prosecution until shortly after the trial, was fully aware of Nestor's history of psychiatric treatment. Indeed, he was more than simply aware of that history; he had interviewed Dr. Weitzen shortly after the indictment was returned. On those facts the District Court properly denied, in its discretion (see *United States* v. *Silverman,* 430 F.2d 106 (2d Cir. 1970), *cert. denied,* 402 U.S. 953 (1971) a new trial to Nestor on the grounds of "newly discovered evidence." Simply put, all that appellant was seeking was the opportunity to incorporate previously known evidence into a second trial. See, *United States* v. *Soblen,* 203 F. Supp. 542, 565 (D.C.N.Y., 1961), *aff'd,* 30 F.2d 236, 242 (2d Cir.), *cert. denied,* 370 U.S. 944 (1962); *United States* v. *Passero,* 290 F.2d 238, 244 (2d Cir.), *cert. denied,* 368 U.S. 819 (1961).

Even apart from the staleness of the "evidence" of Nestor's incompetency, there was no serious showing to the District Court to contradict its own impression (as well as, apparently, attorney Lewis' initial impressions) that Nestor was perfectly competent. Attorney Lefkowitz' conclusion notwithstanding, the affidavits of Drs. Weitzen and Ferris do not raise the issue of Nestor's claimed incompetency. Those doctors say no more than that Nestor's decision on November 27th to remain with Attorney Lewis was "incom-

petent." They are vague and, at most, state that Nestor suffers from depression. They do not suggest that Nestor was mentally incompetent at the trial. See *United States* v. *Sullivan,* 406 F.2d 180, 185 (2d Cir. 1969). They do not suggest that Nestor was mentally incompetent at the time they wrote their affidavits. And they don't suggest that Nestor was likely to be incompetent in the future. Finally, they don't suggest that Nestor was incompetent at the time when he retained Mr. Lewis and, thereafter, when Mr. Lewis discussed the conflict problem "on several occasions" (See Transcript of November 26, 1973 at p. 13, Government's Appendix, A. 13). The District Court properly ignored the claim of incompetency as frivolous because of its selectivity and lack of adequate substantiation. See, *United States ex rel. Roth* v. *Zelker,* 455 F.2d 1105, 1108 (2d Cir.), *cert. denied,* 408 U.S. 927 (1972); *Lebron* v. *United States,* 229 F.2d 16, 18 (D.C. Cir. 1955), *cert. denied,* 351 U.S. 974 (1956); *United States* v. *Mirra,* 379 F.2d 782, 787 (2d Cir.), *cert. denied,* 389 U.S. 1022 (1967); *United States* v. *Wilkins,* 334 F.2d 698 (6th Cir. 1964). Indeed, given counsel's rejection of the Court's statement at sentencing that Nestor would be committed for psychiatric evaluation pursuant to Title 18, United States Code, Section 4208(b), it would seem that the issue has been entirely abandoned so far as it bore on appellant's Rule 33 claims and certainly insofar as his claims under Title 18, United States Code, Section 4244.

Each appellant claims that the case of *United States* v. *DeBerry,* 487 F.2d 448 (2d Cir. 1973), mandates a reversal of their judgment of conviction. In *United States* v. *DeBerry, supra,* the two defendants were represented by the same attorney in the District Court. After the trial began, the Assistant United States Attorney brought to the Court's attention the possibility that the defendant Edwards would testify and incriminate himself while exonerating his co-defendant, DeBerry. There was evidence that Edwards, who had known DeBerry for several years, was like an "uncle" to DeBerry. When the court was advised of the

possibility that Edwards would testify, it inquired of defense counsel and was told that Edwards would not so testify.* Thereafter, *DeBerry* testified and exculpated himself while incriminating Edwards. Each was convicted and, on appeal, represented by separate counsel, the defendants contended that they were denied the effective assistance of counsel by virtue of the joint representation.** Continuing the rule set forth in *United States* v. *Lovano,* 420 F.2d 769, 773 (2d Cir.), *cert. denied,* 397 U.S. 1071 (1970); *United States* v. *Alberti,* 470 F.2d 878, 881 (2d Cir. 1972), *cert. denied,* 411 U.S. 419 (1973), and *United States* v. *Morgan,* 396 F.2d 110, 114 (2d Cir. 1968), the Court in *DeBerry,* quoting from *Lovano,* stated (487 F.2d at 452-453):

> ". . . this court has held that '[t]he rule in this circuit is that some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel'."

Appellant Nestor Vowteras makes no claim, whatever, of prejudice resulting from the joint representation. He simply claims that he was not competent to "waive" separate counsel (see Appellants' Brief, Point Three). As such, his contention is without merit. See *United States* v. *Wisniewski,* 478 F.2d 274, 281 (2d Cir. 1973). Appellant

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* Counsel for the defendants in the *DeBerry* case also assured the Court: "I have explained and gone over all the facts with both of these defendants in my office numerous times. . . . [W]e have discussed it very carefully and I have been very careful about this." *United States* v. *DeBerry, supra,* at 453.

** Ironically, both appellants herein are represented on this appeal by the same counsel; yet, they assert under the *DeBerry* case that they should not have been represented by the same counsel at the trial.

Nicholas Vowteras uses the word "prejudice" and argues that he would not have gone to trial represented by the same counsel who represented his brother, a mental incompetent. In that regard, he gratutiously states that ". . . there is no evidence whatever that he had knowledge of Nestor's mental condition" (Appellants' Brief, p. 23). Appellants' arguments are utterly absurd.

There can hardly be any question but that the District Court conducted the fullest of inquiries of appellants and their counsel. See, *United States* v. *Fisher*, 469 F.2d 1, 5 (1st Cir. 1972).* That inquiry, which was conducted on two separate days prior to the commencement of the trial, reflected the unequivocal desire of both appellants to proceed to trial as brothers, with the same attorney and the same defense. Thus, Nicholas, who testified, fully supported not only his own defense of entrapment but Nestor's as well. Moreover, Nicholas' separate defense of nonparticipation was also fully aired and, indeed, was partially reflected in the jury's verdict which acquitted him on the two counts stemming from the bribe payments of December 21st. In short, no possible prejudice could have resulted from the joint representation, nor did prejudice, in fact,

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* To the extent that the notion of "waiver" is always a useful tool in resolving problems arising out of joint legal representations, it seems that these appellants, regardless of any prejudice they may have suffered, "knowingly" and "intelligently" waived that prejudice. See, *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 235-245 (1973). The extent of appellants' "waiver" can, perhaps, best be understood by hypothesizing the situation in which a District Court, given the expressed desire of two defendants (such as given by appellants herein) to proceed with single counsel, nevertheless ordered that they be separately represented. See *United States* v. *Sheiner*, 412 F.2d 337, 342 (2d Cir. 1967), *cert. denied*, 396 U.S. 825 (1969); *United States* v. *Wisniewski*, *supra*, at 284-285; *United States* v. *Frame*, 454 F.2d 1136 (9th Cir.), *cert. denied*, 406 U.S. 925 (1972).

result.* Moreover, there is no suggestion that Mr. Lewis did not serve each of his clients in the highest traditions of his profession.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

Dated: June 20, 1974

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

RAYMOND J. DEARIE,
PAUL B. BERGMAN,
Assistant United States Attorneys,
*Of Counsel.***

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* The Government cannot fathom Nicholas Vowteras' claim of prejudice stemming from his brother's alleged incompetency, unless it be that had he known of his brother's incompetency he would have been in a position to cross-examine Nestor, had Nestor taken the stand as a witness. But, Nestor did not take the stand. Moreover it is highly doubtful that Nicholas did not know of his brother's visits to Dr. Weitzen, not alone because of their "close relationship" (1140), but also because Nicholas had been supplied, as early as August, 1973, with a copy of Nestor's post-arrest statement in which Nestor's visits to Weitzen were mentioned (see Defendants' post-arrest statements, Government Exhibit 3500-1, and Letter of August 23, 1973, Government's Appendix, A. 60, A. 61, A. 67).

** The United States Attorney's Office wishes to acknowledge the assistance of Leslie Phillips Rudman, a third year law student at Hofstra University Law School in the preparation of this brief.

Form No. USA-52a-6a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 20th day of June 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, two copies of the brief for the appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Jacob Lefkowitz, Esq.
150 Broadway
New York, New York 10038

Sworn to before me this
20th day of June 1974

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1975

Deborah J. Amundsen

DEBORAH J. AMUNDSEN